



November 15, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2001-5304

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154853.

The Texas Department of Transportation (the "department") received a request for copies of a variety of documents pertaining to Fortson Contracting, Inc. ("Fortson"). You state that you will provide the requestor with some responsive information. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.104, 552.110, and 552.128 of the Government Code.¹ You also state that you have notified the contractor who may be affected by the potential release of the submitted information of the request in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). This office received no comments from Fortson. Thus, we have considered the exceptions you claim and have reviewed the submitted information.

You claim that the information you submitted as Exhibit B pertaining to pre-qualification financial submissions by department bidders is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure

¹ Although you claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, you do not provide any reasons as to why section 552.101 applies to the submitted information as an independent exception to disclosure. *See* Gov't Code § 552.301(e)(1)(A). Accordingly, we do not address this exception with regard to any of the submitted information.

“information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. Section 552.104 also protects information from disclosure when the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 592 at 8-9 (1991), 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* Open Records Decision No. 593 at 4 (1991). Based on our review of your arguments and Exhibit B, we conclude that the department has demonstrated that the release of this information would cause specific harm to the department’s interests in particular competitive bidding situations. Accordingly, the department may withhold Exhibit B from disclosure pursuant to section 552.104 of the Government Code.

You also claim that the information you submitted as Exhibit C pertaining to financial submissions made by a disadvantaged business enterprise is excepted from disclosure pursuant to section 552.128 of the Government Code. Section 552.128 provides that:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant’s status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant’s agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in

connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. We find that most of the submitted information in Exhibit C is information that Fortson submitted to the department in connection with its application for certification as a disadvantaged business entity. You state that Fortson has not given express written permission for the release of this information. Further, it appears that subsections (b) and (c) of section 552.128 do not apply in this instance. Therefore, we conclude that the department must withhold the marked information in Exhibit C from disclosure pursuant to section 552.128 of the Government Code. However, some of the information in Exhibit C is not information that Fortson submitted to the department in connection with its application for certification. Accordingly, the remaining portions of Exhibit C must be released to the requestor.²

In summary, the department may withhold Exhibit B from disclosure in its entirety pursuant to section 552.104 of the Government Code. The department must withhold the information that we have marked in Exhibit C from disclosure pursuant to section 552.128 of the Government Code. The department must release the remaining portions of Exhibit C to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

² As section 552.128 is dispositive, we do not address the department's arguments regarding section 552.110. We note that the information in Exhibit C that must be released to the requestor does not contain any information that would be excepted from disclosure pursuant to section 552.110 of the Government Code.

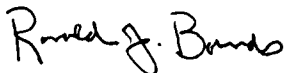
statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 154853

Enc. Marked documents

cc: Mr. J. Patrick McLaughlin
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(w/o enclosures)